IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 7569

LAKE UNION DRY DOCK & MACHINE WORKS,
A Corporation,

Appellant,

—*vs*—

UNITED STATES OF AMERICA,

Appellee.

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS
United States Attorney

JOHN AMBLER
Assistant United States Attorney

OWEN P. HUGHES
Assistant United States Attorney

Office and Post Office Address:

222 Post Office Building,
Seattle, Washington

SUBJECT INDEX

TABLE OF CASES CITED

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 7569

LAKE UNION DRY DOCK & MACHINE WORKS,
A Corporation,

Appellant,

—vs—

UNITED STATES OF AMERICA,

Appellee.

On Appeal From a Judgment of the United States District Court
for the Western District of Washington,
Northern, Division

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

While the statement of the case as presented in appellant's brief is subject to no correction, a more complete statement of the case is deemed essential to a proper presentation of appellee's argument in support of the judgment from which appellant prosecutes this appeal.

On or about the 18th day of November, 1931, appellee entered into a written contract with the appellant, a corporation operating a dry dock and ship repair business on Lake Union, at Seattle, Washington. Under the terms of this contract the appellant agreed to make certain repairs on the United States Coast Guard Cutter "Guard." (Tr. 14, 76, 77) The contract (Appellee's Exhibit 1) contained the following provision:

> "*General Conditions.* Fire protection. It is clearly understood that the contractor agrees to furnish the vessel with ample fire protection during the time in dry dock or on the Marine Way." (Tr. 14)

In pursuance to the contract, the appellant placed the vessel "Guard" on a floating dry dock 32 feet wide by 70 feet long. (Tr. 47) This floating dry dock was

moored in an open waterway on the south side of a wharf, which ran in a general easterly and westerly direction out into Lake Union. This wharf formed the north side of the waterway referred to, which waterway was approximately 100 feet wide, being bounded on the south by a row of piling running parallel to the wharf. To the north of the dry dock, and located upon the wharf against which the dry dock lay, and extending in an easterly and westerly direction at a distance of about 30 feet from the southerly side of the wharf, was an open woodworking shed known as a joiner shop, which extended parallel to the dry dock and to a distance of approximately 30 feet beyond its easterly end. Fifteen feet east of this joiner shop and on the same wharf was a boiler room with an approximate dimension of twelve feet by sixteen feet. This latter building was thus in a northeasterly direction from the floating dry dock and was approximately 50 feet distant therefrom.

Appellant's plant was equipped with fire-fighting equipment consisting primarily of a number of chemical fire extinguishers. Three two-and-one-half-gallon chemical extinguishers separated by twenty-foot inter-

vals were hung upon the southerly side of the posts separating the south side of the joiner shop and directly opposite the floating dry dock. (Tr. 54) A fifty-gallon chemical fire extinguisher was located upon the northerly side of the joiner shop. (Tr. 54, 69) A canvas covered two inch fifty foot fire hose and connection was also located upon the north side of the joiner shed and approximately 125 feet from the vessel "Guard." (Tr. 70) Extending from the water system of appellant's plant to the wharf adjacent to the dry dock was a one inch water pipe connection to which a 100 foot one inch hose was attached. (Tr. 34, 54) The primary purpose of this one inch hose was the washing of the sides of the vessels and ships while in dry dock, and was not such a hose as ordinarily used for fire protection. (Tr. 40, 54) The engines of the "Guard" while undergoing repairs in the dry dock were dismantled and part of her fire equipment consisting of a one and one-half inch hose and water pumps were rendered useless. (Tr. 35, 39, 41) The nozzle of the one inch hose was extended to the "Guard" for its own protection while on dry dock. (Tr. 34, 35, 40, 43)

On the night of December 29th, and during the early morning hours of December 30, 1931, the appellant had but one employee, a night watchman, on duty at its plant. (Tr. 56, 61) The principal duty of this employee was that of making hourly rounds of appellant's plant and punching the several clocks situated at various points. (Tr. 61) This operation consumed approximately fifteen minutes, and appellant's night watchman spent the remaining forty-five minutes of each hour in the dock master's office situated approximately 125 feet from the boiler room. (Tr. 61) At about the hour of five A.M. on December 30, 1931, a fire was discovered in the boiler room of appellant's plant by a man named Gallagher, not an employee of appellant, who lived on a barge moored nearby. (Tr. 61-67) Gallagher notified appellant's watchman, who was then in the dock master's office reading a newspaper and who had not made a round of appellant's plant for approximately forty-five minutes, of the existence of the fire. Gallagher then telephoned an alarm to the fire department. (Tr. 61, 65, 67) Upon being notified of the fire, appellant's night watchman went to the entrance gate into appellant's plant and opened the

gate for the fire department to enter. (Tr. 61, 67) Usually the first equipment of the fire department would respond to this location in from three to five minutes, but on this occasion the equipment did not arrive for ten or fifteen minutes. (Tr. 61, 62, 63, 68) At the time of the fire there were two members of the crew quartered on the vessel "Guard." (Tr. 36, 38, 41, 48) Shortly after the fire broke out in the boiler room these men were awakened by Gallagher (Tr. 67), and proceeding from their own vessel to the wharf took the one inch hose, the nozzle of which had been placed on the bow of the "Guard" for its own protection, turned on the water, and attempted to quench the fire in the boiler room. (Tr. 41, 48, 49) They were unable to stop the fire in the boiler room, and the fire spread to the joiner shop in which was stored inflammable material, and a dingy belonging to the "Guard" was stored about forty feet from the end of the shop. (Tr. 41, 48, 49, 50, 57) Finding that they were unable to stop the fire, the two seamen removed the dingy from the shop and carried it to a place of safety. (Tr. 41, 44, 48) On returning to the "Guard", it was discovered that the fire had spread to the dry dock, and thereupon

the two men cut the dry dock loose, and, with the aid of a slight wind which had blown the fire to the "Guard", moved the dry dock south across the waterway where the blaze on the "Guard" was extinguished. (Tr. 42, 43, 44, 48, 49) Approximately fifteen or twenty minutes elapsed between the time the two seamen were awakened by the fire and the time the dry dock was cast adrift from the wharf. (Tr. 43) The night watchman did not go to the "Guard", nor did he use the chemical fire extinguishers, or request the two seamen to use them. (Tr. 41, 42, 62, 63, 64, 69) The two seamen did not see appellant's watchman or receive aid from any other person. (Tr. 41, 42) The crew of the "Guard" had received no instructions with regard to the use of appellant's fire-fighting equipment. (Tr. 39, 54)

By reason of the fire the vessel "Guard" was badly scorched, necessitating the replacement of a planking and the making of other repairs, the expense of which amounted to the sum of $3,362.00. (Tr. 36, 38) Suit was instituted by appellee against the appellant to recover the sum of $3,362.00, it being alleged that the appellant had failed to provide ample fire protection

as required by the contract of November 18, 1931 (Appellee's Exhibit 1), and further that the appellant was negligent in permitting the fire to spread from its plant to the vessel "Guard." (Tr. 1 to 5)

In its answer appellant admitted the fire and the damage to the vessel "Guard", but denied negligence and alleged that it had furnished ample fire protection in accordance with the terms of the contract, and as an affirmative defense alleged that the crew of the "Guard" had ample opportunity to move said boat to a position of safety and they were guilty of a breach of duty in failing to do so. (Tr. 5 to 8)

The case was tried by the Court without the intervention of a jury in accordance with the stipulation between parties. (Tr. 10) Appellant's written motion for a judgment of dismissal, interposed at the conclusion of all the evidence, was denied. (Tr. 75) Proposed findings of fact and conclusions of law were submitted by both appellant and appellee. (Tr. 76-83) Subsequently, the Court made and entered findings of fact and conclusions of law in the case. (Tr. 13, 18) Appellant excepted to a number of these findings and conclusions, as well as to the failure of the Court to

make and enter several of the findings of fact which it had proposed. (Tr. 83, 90) The Court failed to make further findings of fact and conclusions of law. (Tr. 90) Appellant excepted to the Court's rulings. (Tr. 90) All of appellant's exceptions were allowed by the Court. (Tr. 90)

The Court entered judgment in favor of appellee and against appellant in the sum of $3,362.00, together with interest thereon at legal rate, from March 12th, 1932, plus the legal costs. (Tr. 19-20)

This is an appeal from that judgment of the United States District Court for the Western District of Washington, Northern Division, entered upon the 12th day of June, 1934, by the Honorable Jeremiah Neterer, Judge.

ASSIGNMENTS OF ERROR

The assignments or specifications of error set forth in appellant's brief are all predicated upon certain findings of fact made and entered by the Court, and its refusal and failure to make and enter various findings of fact proposed by appellant. The assignments under which it is contended that the Court erred

are assembled under four main headings as follows:

1. In holding that the relation existing between appellee and appellant at the time of the fire was that of bailor and bailee.

II. In holding that the appellant did not exercise ordinary care in protecting the "Guard" after the fire was discovered.

III. In holding that the appellant did not furnish the "Guard" with the fire protection called for by the contract.

IV. In failing to hold that the crew of the "Guard" breached their duty to protect their vessel.

Each of the foregoing main categories into which appellant has segregated its assignments of error will be taken up in this brief in the order in which they are set forth, except those assignments under the main headings numbered II and III, which will be considered together under the heading, "Apellant failed to furnish the "Guard" ample fire protection in accordance with the contract and was guilty of negligence."

ARGUMENT

1. RELATION OF BAILOR AND BAILEE EXISTED BETWEEN APPELLANT AND APPELLEE, AND THE BURDEN OF PROOF WAS ON APPELLANT TO SHOW IT EXERCISED ORDINARY CARE.

It is contended by appellant that the Court's finding "that the relation between plaintiff and defendant was that of bailor and bailee under bailment to the mutual benefit of both parties" (finding of fact number three, Tr. page 18), constituted error by reason of the fact that exclusive possession of the vessel "Guard" had not been delivered by appellee to the control and custody of the appellant. The evidence relied upon in appellant's crew remained on board the "Guard" while in dry dock during the daytime engaged in routine activities, while two members of its crew remained on board the vessel at night. It is further urged that even though a bailment existed between the parties, there was no presumption of negligence on the part of the appellant for the following reasons.

1. The showing that the damage occurred by fire overcomes any presumption of negligence, and the burden of going forward with the proof of actual negligence remains with the plaintiff.

2. The complaint pleads certain specific and definite acts of negligence, and in such a case the burden is on the plaintiff to establish the same without the aid of any presumption.

The Circuit Court of Appeals for the Second Circuit, in the case of *Pan-American Petroleum T. Co. vs. Robbins D. & R. Co.*, (1922) 281 Fed. 97, were confronted with similar questions. This was a libel based on a breach of contract and alleged negligence of the respondent dry dock company in failing to make certain repairs on the steamer George E. Paddleford in a careful and workmanlike manner. Shortly after the vessel left the respondent's dry dock, and while she was turning in the Erie Basin, it was found that her engine telegraph system, which had been the subject of the repairs, was defective. The action was instituted to recover damages the vessel was forced to pay to another vessel with which it had come into collision

as a result of the defective telegraph. The appellate court reversed the lower court's findings that the negligence alleged in the libel had not been proven.

1. With reference to the argument advanced by respondent Dry Dock Company that it did not have exclusive possession of the vessel because several of the libelant's officers remained on the ship while undergoing repairs, the Court said:

> "The respondent urged below and in this court that it was not called upon to explain the condition of the telegraph, because it did not have exclusive possession, inasmuch as during the time the ship was being repaired some of the officers were on board the boat. * * * It will be admitted that the rule which raises a presumption of negligence in the bailee, where goods are delivered in good condition and are returned in bad condition, does not apply if the possession of the bailee has not been exclusive of the bailor. * * *But it is to be observed that the bailment in this case was that classed as 'Locatio Operis Faciendi'; there being work and labor to be performed on the thing delivered. * * *It needs no citation of authorities to establish the elementary principle that where skill is required in performing the bailee's undertaking as in the case of the work to be done on the electrical apparatus of this steamship, the bailee must be understood to use a degree of skill adequate to the performance of his undertaking."

2. It was likewise urged that as in the case at bar, no negligence was proven. The Court held that in a tort action based wholly upon negligence, the burden was upon the libelant to prove negligence, but this was not so in contract, the rule being stated as follows:

> "It is true that the libel in the case now before us asserts negligence and the answer denies that negligence existed, and the District Judge has held that the respondent's negligence has not been proven. * * *But we do not base the decision of this case on the ground of the respondent's negligence. It is necessary to keep in mind, what the Court below failed to note, that this suit is brought on contract; that it is alleged that libelant delivered the ship into the respondent's possession under an agreement that it would execute certain work. * * *The burden was on the libelant to prove the contract, and that at the time the respondent delivered back the ship the telegraph was not properly adjusted and in good working condition. This burden was sustained. The presumption then arose that the respondent had not performed its contract, and was responsible for the condition in which the telegraph then was. The burden then rested on the defendant to overcome this presumption, and to establish by a preponderance of the evidence that it had fully performed its agreement, * * * ."

In the case of *International M. M. S. S. Co. vs.*

V. W. & A. Fletcher Co., (C.C.A. 2nd) 1924, 296 Fed. 855, the facts were quite analagous to the facts in the instant case. The libellant Steamship Company commenced an action in tort against respondent dry dock company to recover for damages sustained by the S. S. St. Louis while undergoing repairs in dry dock by support of this contention is the fact that a portion of reason of fire. It was alleged that the respondent dry dock company was negligent in using an open flame blow torch near highly inflammable paint remover which was being used to remove the paint on the grand stairway of the S. S. St. Louis. The evidence revealed that employees of libelant were doing other work on the vessel, but that the fire originated in a portion of the ship under respondent's control. The lower court's judgment in favor of libelant was sustained, and in holding that there was a presumption of negligence, the Court stated:

> "The contract for reconditioning the S. S. St. Louis and other vessels belonging to libelant was one of bailment * * * and respondents, the bailees, were to do the work with their own servants at their own yard. That contemporaneously the libelants were to do and were doing other work is

immaterial. The portion of the ship where fire broke out was wholly under respondents' control."

> "Undoubtedly the general rule is that negligence is never presumed, and he that alleges it must prove the same; yet where one receives a chattel in certain condition, and redelivers it with marks of injury that only culpable negligence would probably cause, 'it is the bailee who should open his mouth and make explanation to relieve himself;' and certainly slight evidence under such circumstances will shift the burden of evidence."

It will be noted in the foregoing cases that although specific acts of negligence are alleged in the libel, the Court held this to be a case of bailment, and the libelant by showing that its vessel was returned to it in a damaged condition threw the burden of proof on respondent to show that it exercised ordinary care.

Again in the case of *Newport News Shipbuilding and Dry Dock Co. vs. United States*, 1929, (C.C.A. 4th) 34 Fed. (2d) 100, where a shipyard company was held liable on the ground of negligence for a fire occurring on the S. S. America which was being repaired at its yard, it was held that the fact that a considerable part of the crew of the ship remained aboard did not effect the question of liability unless

the fire occurred in the part of the ship which they occupied. Quoting from the Court's opinion:

> "The ship had been delivered to the shipyard, and at the time of the fire was lying moored at the shipyard's dock. The fire broke out in a stateroom where only employees of the shipyard were present. The admitted circumstances are such as to place upon the shipyard the burden of proving absence of negligence on its part or the part of its employees. No attempt was made to assume this burden, and on this theory the United States is undoubtedly entitled to recover. A prima facie case of negligence was undoubtedly made out."

The Court further held that even though negligence had not been proven by the shipowner, the shipyard's failure to comply with the contract respecting fire protection had been shown and would have rendered it liable. The shipyard on either theory would have been responsible for the loss. This was also a case where specific acts of negligence were set forth in the libel, yet the Court held that the relationship was one of bailment and the shipyard had the burden of proving the absence of negligence.

In the case of *Cary-Davis Tug & Barge Co. vs. Fox*, 1927 (C.C.A. 9th) 22 Fed. (2d) 64, which also

came up on appeal from the District Court of the United States for the Northern Division of the Western District of Washington, a repairman was working on a tugboat which was in use by the owner during a portion of the time, and the court below found that the cause of fire was "from some condition or substance or material from a creation or contact while the tug was in the exclusive control of the owner, and that no agency of the contractors in any way contributed to the fire." The appellate court declined to overrule the finding of fact of the court below, although it recognized the usual rule applicable to bailees having exclusive possession.

The Circuit Court of Appeals for the Fourth Circuit, in the case of *Thompson vs. Chance Marine Const. Co.*, 1930 45 Fed. (2d) 584, recognizes the same rule laid down in the foregoing decisions. This was a libel brought to recover damages for the loss by fire of a small gas boat while undergoing repairs. The lower court found that the construction company had proven the absence of any negligence on its part or the part of its employees in causing the fire, and dismissed the libel. The appellate court refused to disturb the find-

ing of the lower court and affirmed the judgment.

A. Cases cited by Appellant may be readily distinguished.

In *The Kennebec*, (C.C.A. 4) 258 Fed. 222, the ship owner sued the dry dock company for failure to furnish steam to a vessel as a result of which certain water pipes froze and bursted. The following language clearly distinguishes this case.

> "It thus appears that whatever request for heat may have been made the dock company at once refused, and the captain without protest took measures accordingly. If, therefore, the dock company was under any obligation it was an obligation, not of contract, but imposed by law because of the relationship of the parties."

The Court further held that the work of the appelee was confined to the exterior of the hull and had nothing to do with any other part of the vessel.

> "The captain continued in command, and he and the crew stayed on board. In every substantial sense the ship remained in the control of her master, and the dock company certainly did nothing to interfere with that control, or to prevent him from doing whatever he thought necessary to protect the machinery of the vessel."

In *Boe vs. Hodgson Graham Co.*, 1918, 103 Wash. 669, 175 Pac. 310, the bailor's brother-in-law, the former navigator of the vessel, by agreement, was aboard the ship during her use by bailee, and on conflicting testimony the Court found that he was in charge of her operations, and that the fault, if any, was his.

The true rule of bailment as applicable to the case at bar, is expressed in the shipyard cases referred to above and is recognized by the Supreme Court of Washington in the case of *Burley vs. Hurley-Mason*, 1920, 111 Wash. 415, 191 Pac. 630. Here one using a scow received in good condition, and returned in bad condition, was held liable on the ground that the presumption arising from the fact of injury was not overcome by the evidence. The Court in expressing the correct rule said:

> "Before taking up the consideration of the questions of fact, two rules of law should be stated, the first of which is that the appellant did not become liable as an insurer for any damage that the scow might sustain while in its possession but only for the failure to exercise ordinary care * * *. The other rule is that, in cases where property is delivered to the bailee in good condition and returned damaged, a presumption arises of negligence on the part of the bailee and casts upon him the

burden of showing the exercise of ordinary care."

The case of *McDonald vs. Perkins*, 1925, 133 Wash. 622, 234 Pac. 456, 40 A.L.R. 859, cited by appellant, recognizes the usual rule.

Appellant cites the cases of *Ex Parte Mobile Light & R. R. Co.*, 1924, 211 Ala. 525, 101 So. 177, 34 A. L. R. 921, *Broaddus vs. Commercial National Bank*, 1925, 113 Okla. 10, 237 Pac. 583, 42 A.L.R. 1331, and *Kee vs. Bethurum*, 1930, 146 Okla. 237, 293 Pac. 1084, in support of its contention that in the instant case there was no relationship of bailor and bailee. The first case involves the relationship existing between an automobile owner and the operator of a parking lot, while the two last cases cited present that relationship existing between landlord and tenant. But in the present case, the vessel "Guard" had been delivered to the appellant's shipyard for repairs, and the relationship existing has been classed by the foregoing shipyard cases as a "*locatio operis faciendi*" bailment, thus there is no analogy between the cited cases and this case.

Colburn vs. Washington State Art Ass'n., 1914, 80 Wash. 662, 141 Pac. 1153, L.R.A. 1915 A, 594,

Burke vs. Bremerton, 1925, 137 Wash. 119, 241 Pac. 678, and *Southern R. R. vs. Prescott*, 1916, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. Rep. 469, are cited in support of the rule that where the bailee has fixed the cause of the damage which is not ordinarily or necessarily attributable to his negligence, that the burden of going on with the evidence then shifts to the bailor to prove actual negligence. This, however, is not the rule in shipyard cases as may be seen from the decision in *Newport News vs. U. S.*, 34 Fed. (2d) 100, *supra*, which distinguishes *Southern R. R. Co. vs. Prescott*, in the following language:

> "The cases cited in respondent's note—like *Southern Railway Co. vs. Prescott*, 240 U. S. 632, 36 S. Ct. 469, 60 L. Ed. 836—are not, in my opinion, in point, for in all such cases the bailee was a mere custodian, whereas in the cases from which I have quoted, as in this case, the bailment was that known as *locatio operis faciendi.**** (Italics ours)

Appellant urges that having pleaded specific acts of negligence, appellee cannot rely upon presumptions. In the first two cases cited on pages 24 and 25 of appellant's brief, the Court again refers to the line of cases distinguished in the *Newport News* case where the bailee is merely a custodian.

In the *Delaware* case and the *Glacier Fish* case cited on the same two pages, the court likewise emphasizes the fact that if a plaintiff relies upon negligence he must prove it, which is obvious. As has been previously noted in the shipyard cases, although specific negligence was alleged, the presumption was nevertheless indulged in.

It is submitted that from the evidence in this case and the decisions cited, the lower court committed no error in finding that the relationship between appellant and appellee was one of bailment. The appellee having delivered the vessel "Guard" to appellant's plant for repairs, the bailment created was one classified as *locatio operis faciendi.* Although two members of the crew of the "Guard" were on board the vessel at the time of the fire, no contention has been made that it had its origin in a place under the control of the appellee or its employees. It is undisputed that the fire which caused the damage originated in the boiler room of appellant's plant, spread to its joiner plant, and then to the vessel "Guard." Under these circumstances, upon a showing of the appellee of the return of the vessel "Guard" in a damaged condition, the onus was

upon the appellant to prove the damage was not occasioned by its negligence. Appellant failed to meet the prima facie case so established.

II. APPELLANT FAILED TO FURNISH THE "GUARD" AMPLE FIRE PROTECTION IN ACCORDANCE WITH THE CONTRACT, AND WAS GUILTY OF NEGLIGENCE.

On page 27 of its brief, appellant comments that it is not suggested that appellant did anything which caused the fire to spread. That is not the point here involved. The contract between the parties specifically provided:

> "GENERAL CONDITIONS * * * Fire Protection—It is clearly understood that the contractor agrees to furnish the vessel with ample fire protection during the time in dry dock or on the marine way."

The vessel was in dry dock. That ample fire protection was not furnished is clearly evidenced by the fact that the vessel was damaged by fire.

On page 28 appellant comments that the only man on duty was the night watchman, Clark. The plant

was a sizeable one and ample fire protection would certainly include the employment of more than one watchman, especially when ships were in appellant's dry dock. The testimony clearly shows that this watchman's duties were such that he could render no assistance whatsoever to the vessel in question, nor is there any proof that he or anyone else pointed out to the two members of the crew aboard the "Guard" the location of any of the much emphasized fire apparatus. The only piece of fire apparatus used was that used by the two volunteer members of the ship's crew and consisted of a small hose primarily kept to hose down the hulls of ships as they were withdrawn from the water. There was no protection other than this piece of apparatus which eloquently proved its inadequacy.

The lower court found that the plant was equipped with fire apparatus sufficient for its own protection, but there was no fire protection afforded for the protection of the vessel on the dry dock, either by water supply or chemical apparatus. (Tr. 17, 18) Appellant urges that as the hose used by the two employees of the "Guard" was approximately the same size as their own hose aboard the ship that this was all that

was required by the contract. The fallacy of this is quite obvious. Where a vessel is in the water with engines capable of use, she can readily withdraw from a burning dock or other structure, and her fire apparatus is merely designed to protect her from fires within. However, when the ship is out of water, entirely helpless, not only has the vessel need of protection from some fire aboard ship, but from the added hazard of ships in the near vicinity and a dry dock where the work is of such a character as to be a constant fire menace. It was under these circumstances that the contract required "ample fire protection" while the "Guard" was helpless, and it is obvious that ample fire protection consisted of something more than a one inch hose hanging over the rail of the ship with no one to operate it.

Counsel for appellant call attention to the fire buckets, fire hose and sand boxes, scoops and portable fire extinguishers required by regulations to be kept aboard a Coast Guard vessel. By the time the fire had reached the "Guard" these would be, of course, utterly useless, as they are merely emergency devices and the fire hose aboard ship was never capable of use as the

ship had no power. The one inch hose extending from appellant's wharf to the "Guard", as indicated by the testimony of Mr. Snydow (page 35 of the brief, Tr. 40), was merely a precaution to take care of a fire arising on the vessel, and for that purpose it might be sufficient in view of the limited area. Under no conceivable theory could it be considered adequate to protect against a dock fire.

It is urged that the two men aboard the "Guard," who were in fact volunteers as far as this work was concerned, did not do all that they should have done. This is answered by a specific finding of the lower court in the following language:

> "The seamen acted with all diligence and as reasonably prudent persons would under the circumstances, in the protection of their vessel." (Tr. 17, 18)

Counsel, on page 36 of his brief, appears to consider there was an obligation upon the ship's crew to have used the fire extinguishers. "Ample fire protection" includes not only the equipment, but likewise the men to use the same.

Counsel urges the tardy arrival of the City Fire

Department. This has no bearing where a positive contract to protect the vessel is concerned.

Counsel's repeated description of the various fire apparatus is of no moment, as none of it was used, nor was any of it capable of being used as there was no one present to use it.

On page 31 of its brief, appellant says:

> "We submit, therefore, that there is absolutely no evidence of negligence on the part of the watchman, the only employee of the appellant who was in the plant."

The evidence discloses that at the time of the fire, the watchman was in the dockmaster's office, which was approximately 125 feet from appellant's boiler room, reading a newspaper, and that he had been there for a period of 45 minutes after making the last round of appellant's plant. Tr. 61, 67) This employee of appellant knew nothing of the fire until it had gained some headway, and then he was informed of its existence by an outsider. (Tr. 61, 67) According to his own testimony, he opened the gates of appellant's yard so that the fire department might enter and then made some unsuccessful attempt to use a two inch canvas

covered fire hose, but he made no effort whatever to aid the two men on the "Guard," nor did he go near that vessel. (Tr. 61-65) The outsider who had notified the watchman of the existence of the fire, telephoned the fire department and aroused the two men stationed on the "Guard." (Tr. 67)

Assuming, however, that appellant's statement that there was no negligence on the part of its watchman is correct, the negligence goes directly back to the owner in the following respects among others:

1. The number of watchmen was ridiculously inadequate.
2. The fire apparatus was incapable of being used as there was no crew to use it.
3. Location and method of use of this fire apparatus was never pointed out or explained to the ship's crew if they were to be relied on for its use.
4. If the watchman was not negligent as appellant urges, then the dockmaster's office, where he was stationed for forty-five minutes of each hour between hourly rounds of appellant's plant, was too far away to be of any practical use for one performing his duties.

We contend, therefore, that appellant failed to furnish the vessel "Guard" ample fire protection while

in dry dock in accordance with the terms of the contract, and that the appellant or its employees were guilty of negligency in permitting the fire to spread to the "Guard."

III. THERE WAS NO FAILURE OF THE CREW TO PROTECT THEIR VESSEL.

It is urged by appellant that the Coast Guard regulations placed the crew of the "Guard" under the duty of expending greater effort in the protection of their vessel. These regulations obviously refer to the duties of the crew while the vessel is in commission. Here the vessel was wholly out of commission, in the hands of a dry dock company which had agreed to furnish "ample fire protection." They were awakened and, as found by the court, did all they could to save the vessel, and did succeed in preventing any very serious loss.

At the trial, and at the conclusion of the government's case, the appellant moved for a dismissal, basing a portion of its motion on the alleged failure of the crew in exercising due care in the protection of their vessel. (Tr. 51) The lower court, who had the opportunity of seeing the witnesses, hearing their testimony

and judging their credibility, in overruling the motion, commented on the course of conduct of the two members of the crew of the "Guard" as follows:

> "Upon that phase of the question, I must say: I do not think your position is well taken. I think, so far as a reasonable conduct on the part of these seamen, they showed about as contiguous conduct as could possibly be conceived. They seemed to act in a rightful sort of way, just what reasonable men would be presumed to do. The first thing they did was to fix this hose and they tried to put the fire out, and when they saw they could not do that,—there was material on the dock, and if there was any wind it was away from the "Guard", and they could reasonably conceive the idea that this was the thing that was in danger, and that was the first thing they did. I think they did exactly the same thing that an ordinarily intelligent person would do, and they came back and got the row boat. I think, as far as these seamen are concerned, they exercised more consecutively reasonable steps than is usually developed, and I think they showed a splendid presence of mind. * * * (Tr. 51, 52)

Certainly, it comes with ill grace from the appellant now to criticize the extent of their activities and the efforts which they voluntarily contributed when they found the shipyard had entirely fallen down on its agreement.

The criticisms in the brief are obviously without merit, first, because the actions of the crew represented their best judgment under emergency conditions when the courts are notoriously lenient in excusing an act done in extremis; and, second, it is pure hypothesis to conjecture what would and what would not have been the wisest program under the circumstances. The good faith of the two men is certainly not questioned. Third, the sole employee of the dry dock company issued no orders and offered no suggestions. After all, it was primarily the dry dock company which should have taken the initiative.

In view of the foregoing, it is urged that the crew of the "Guard" acted as reasonable and prudent men under the circumstances in the protection of their vessel.

CONCLUSION

All of the assignments of error interposed by appellant are predicated upon certain findings of fact made and entered by the lower court and that court's

refusal to enter various findings proposed by appellant. The determination of this appeal depends almost entirely on whether the evidence in the case supports the court's findings. The rule is well established that an appellate court will not disturb findings of fact based on conflicting testimony unless clearly shown to be against the weight of the evidence. In the case of *Thompson vs. Chance Marine Const. Co.*, 45 Fed. (2d) 584, supra, the Court, in sustaining the lower court's findings, said:

> "This court has repeatedly held that a finding of the trial judge, who had the opportunity of seeing the witnesses, hearing their story, judging their appearance, manner, and credibility, on questions of fact, is entitled to great weight, and will not be set aside, unless clearly wrong. *Lewis v. Jones* (C.C.A.) 27 Fed. (2d) 72; *The Hugoton; Malstron Co. v. Atlantic Transport Co.*, (C.C.A.) 37 Fed. (2d) 570. We know of no federal decision to the contrary opinion on this point. Here the judge was in our opinion clearly right in the conclusion reached by him upon the testimony."

Again the Circuit Court of Appeals for the Ninth Circuit in the case of *Cary-Davis Tug & Barge Co. vs. Fox*, 22 Fed. (2d) 64, supra, a shipyard case in which the lower court's findings of fact were upheld, stated:

> "The question involved is largely one of fact. The case was heard on testimony taken in open court, and is therefore controlled by the familiar rule that findings of fact based on conflicting testimony will not be disturbed, unless clearly shown to be against the weight of the evidence. * * * There may be other circumstances in the case, but the foregoing is in substance the material testimony upon which the findings of the court below were based, and from a careful review of the testimony we are unable to say that the findings are contrary to the great weight of the evidence, or indeed that they are against the weight of the evidence at all."

An examination of the evidence in this case as contained in the Bill of Exceptions (Tr. 32 to 74) will disclose that the court's findings of fact that

1. A bailment existed between the parties;
2. Appellant was negligent in protecting the "Guard" after the fire was discovered;
3. Appellant failed to furnish the "Guard" with ample fire protection called for by the contract; and
4. The crew of the "Guard" did not breach their duty in protecting their vessel,

were overwhelmingly supported by the testimony.

We, therefore, respectfully submit that the Court committed no error, and that the judgment of the United States District Court for the Western District of Washington, Northern Division, should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney

JOHN AMBLER,
Assistant United States Attorney

OWEN P. HUGHES,
Assistant United States Attorney.